Nos. 04-1203 and 04-1236

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IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

STATE OF GEORGIA, *et al.*,

Respondents.

TONY GOODMAN,

Petitioner,

v.

STATE OF GEORGIA, *et al.*,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF THE HONORABLE DICK THORNBURGH AND THE NATIONAL ORGANIZATION ON DISABILITY AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether Subtitle A of Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12131-12134, is a proper exercise of Congress' power under § 5 of the Fourteenth Amendment.

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INTEREST OF AMICI CURIAE[1]

Amici Curiae, Dick Thornburgh and the National Organization on Disability ("N.O.D."), respectfully urge the Court to hold that Subtitle A of Title II of the Americans With Disabilities Act, 42 U.S.C. §§ 12131-12134, is a proper exercise of Congress' power under § 5 of the Fourteenth Amendment and therefore validly abrogates the sovereign immunity of the States under the Eleventh Amendment.

Dick Thornburgh served as Governor of Pennsylvania, Attorney General of the United States under Presidents Reagan and Bush, and the highest-ranking American at the United Nations. As Attorney General from 1988 to 1991, Thornburgh advocated for Congress' passage of the Americans with Disabilities Act ("ADA"). He subsequently developed regulations implementing that legislation. Attorney General Thornburgh is a founding member of N.O.D. and Vice-Chairman of the World Committee on Disability. In 2001 he received the George Bush Medal for his service to persons with disabilities. Attorney General Thornburgh is currently counsel to Kirkpatrick & Lockhart Nicholson Graham LLP.

The mission of the National Organization on Disability is to expand the participation and contribution of America's 54 million men, women, and children with disabilities in all aspects of life. For more than 20 years, N.O.D. has built and sustained programs that raise disability awareness, make America's communities accessible, and provide opportunities for employment and growth. N.O.D. joined with other disability organizations and advocates in the effort to enact the ADA. N.O.D.'s leadership includes Honorary Chairman George H. W. Bush, Chairman and President Michael R. Deland, and a Board of Directors that includes Tom Ridge, business leaders, and prominent disability advocates.

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[1] *Amici Curiae* certify that no counsel for a party authored this brief in whole or in part and that no person or entity, other than *Amici*, their members, or their counsel, has made a monetary contribution to the preparation or submission of this brief. The parties have filed letters consenting to the filing of this brief with the Clerk of the Court.

SUMMARY OF ARGUMENT

Amici urge the Court to hold that Subtitle A of Title II (hereinafter "Title II"),[2] considered as a whole, constitutes a proper exercise of Congress' authority under § 5 of the Fourteenth Amendment and therefore validly abrogates the sovereign immunity of the States under the Eleventh Amendment. While *Amici* agree with Petitioners that, as applied to prisons in particular, Subtitle A is a valid exercise of congressional authority, *Amici* respectfully submit that the proper deference to Congress counsels in favor of holding that Title II as a whole is valid § 5 legislation.

This Court has established a two-part test for evaluating congressional legislation under § 5: (1) Congress must have compiled a substantial record of unconstitutional state action; and (2) the legislative remedy must be a congruent and proportional response. *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 735, 737 (2003). In this case – unlike *City of Boerne v. Flores*, 521 U.S. 507 (1997), or *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001) – this Court has already determined that the first prong of this test has been met. *See Tenn. v. Lane*, 541 U.S. 509, 528 (2004) (referring to the "sheer volume of evidence demonstrating the nature and extent of unconstitutional discrimination against persons with disabilities in the provision of public services," justifying "Congress' exercise of its prophylactic power" in enacting Title II). Congress documented exactly the types of conduct against people with disabilities based on fears and stereotypes that this Court held unconstitutional in *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985). In addition, Congress identified numerous violations by States of the fundamental constitutional rights of people with disabilities. *Lane*, 541 U.S. at 524. The only

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[2] As did this Court in *Tennessee v. Lane*, 541 U.S. 509, 517 (2004), *Amici* refer to Subtitle A of Title II simply as "Title II." Subtitle A contains all of Title II's generally applicable requirements. Subtitle B of Title II, in contrast, provides specific requirements for public transportation services. 42 U.S.C. §§ 12141-12165. This Court need not consider Subtitle B or public transportation at this time, as this case is governed solely by Subtitle A.

remaining question, therefore, is whether the Title II remedy falls within Congress' broad discretion for addressing this *proven* record of unconstitutional state conduct. *Amici* submit that the answer is yes.

As this Court has emphasized, Congress' conclusions about "whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment" are "entitled to much deference." *Boerne*, 521 U.S. at 536; *see also Saenz v. Roe*, 526 U.S. 489, 508 (1999) (Congress' authority under § 5 is a "broad power indeed") (citation omitted). Given the extensive record of unconstitutional discrimination and violations of the fundamental rights of individuals with disabilities identified in *Lane*, there can be no doubt that Congress had the authority to enact a broad ban on discrimination against people with disabilities by public entities.

Congress carefully devised Title II to be a congruent and proportional response. Title II prohibits public entities from discriminating against "qualified" persons with disabilities in the provision or operation of public services, programs, or activities. 42 U.S.C. § 12132. A "qualified" individual with a disability is someone who, "with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or participation in programs or activities provided by a public entity." *Id.* § 12131(2). Title II and its implementing regulations provide public entities wide flexibility in deciding how to comply with the statute's requirements. Drawing on its extensive experience under the Rehabilitation Act of 1973, 29 U.S.C. § 701, *et seq.*, Congress expressly mandated that the implementing regulations for Title II be consistent with the regulations issued under the Rehabilitation Act. *See* 42 U.S.C. § 12134. In accordance with Congress' design, the Title II regulations do not require public entities to do anything that would "fundamental[ly] alter[]" the nature of a service, program, or activity, 28 C.F.R. §§ 35.150(a)(3), 35.164, or that would pose an "undue" burden. *Id.* § 35.150(a)(3).

Because Title II does not require fundamental alterations or impose undue burdens, and because it gives States the ability to meet its requirements in a variety of ways, it targets precisely the conduct of public entities that is most likely to be unconstitutional. Congress could properly conclude that, where a governmental entity persists in excluding individuals with disabilities even though including them would be "reasonable," would not pose an "undue . . . burden[]," and would not require any "fundamental alteration" to the policy or program at issue, it is unlikely that there is a legitimate justification for doing so. At a minimum, Congress could reasonably conclude that, in such circumstances, further inquiry into the State's purported justifications was not likely to be cost-effective and would create an unacceptable risk that unconstitutional conduct would escape detection. Particularly in light of the extensive and disturbing record of unconstitutional discrimination by public entities that Congress had before it, Congress could legitimately be concerned that, in the absence of a prophylactic rule, public entities might attempt to hide discriminatory motives behind the pretense of fabricated or incidental reasons for their decisions. Put simply, nothing in the Constitution or this Court's case law requires Congress to accept a substantial risk that the guarantees of the Fourteenth Amendment will, as a practical matter, be under-enforced. On the contrary, § 5 was included in the amendment precisely to ensure that Congress would have the power to adopt appropriate measures to ensure full and effective enforcement of constitutional rights. *See Lane*, 541 U.S. at 518 ("Congress may enact so-called prophylactic legislation that proscribes facially constitutional conduct, in order to prevent and deter unconstitutional conduct.").

Undeniably – and quite advertently – Title II thus sweeps in some situations where public entities would have constitutionally permissible justifications for their exclusionary practices. But it sweeps no more broadly than this Court permitted in *Hibbs*, and it does so for the same reason: in preventing unconstitutional discrimination, "Congress 'is not confined to the enactment of legislation that merely parrots the precise wording of the Fourteenth Amendment,' but may prohibit 'a somewhat broader swath of

conduct'" in order to eliminate otherwise undeterred or undetected misconduct. *Hibbs*, 538 U.S. at 737 (quoting *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 81 (2000)).

Because Title II forbids only government behavior that is *particularly likely* to be irrational or prejudicial and does so without imposing "undue . . . burdens," Title II is a proportional and congruent response to the record of unconstitutional discrimination Congress faced. That Title II also responds to the extensive record before Congress of violations of fundamental rights justifies particularly strong deference to Congress' judgments about the necessity of Title II's reach. *See Hibbs*, 538 U.S. at 737-40; *Lane*, 541 U.S. at 529. Such deference should entail allowing Congress to legislate in the manner it sees fit – here, to enact a general solution to address constitutional violations that had been documented across a broad range of public programs and services. This Court should respect Congress' judgment by holding that its chosen remedy is, as whole, a valid exercise of Congress' § 5 authority, rather than separately scrutinizing each particular application of the legislation.

ARGUMENT

I. Section 5 Of The Fourteenth Amendment Grants Congress "Broad Power" To Enact Prophylactic Legislation To Prevent And Deter Unconstitutional Conduct.

This Court has repeatedly acknowledged that Congress' explicit power under § 5 of the Fourteenth Amendment to enact "appropriate legislation" to "enforce" the substantive guarantees of that Amendment is a "'broad power indeed.'" *Lane*, 541 U.S. at 518 (quoting *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 732 (1982)); *Saenz v. Roe*, 526 U.S. 489, 508 (1999). As this Court explained scarcely a dozen years after the Fourteenth Amendment was adopted, § 5 by its plain terms grants to Congress the power to select the means that in its view are best adapted to enforcing the

guarantees of the amendment, so long as those means are "appropriate":

> Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power.

Ex parte Virginia, 100 U.S. 339, 345-46 (1880) (quoted approvingly in *Lane*, 541 U.S. at 518 n.3); *see also Boerne*, 521 U.S. at 517-18.

Moreover, the range of "appropriate" remedies from which Congress may choose is not limited to those laws that "simply proscribe conduct that [this Court] ha[s] held unconstitutional." *Hibbs*, 538 U.S. at 727. "Congress is not limited to mere legislative repetition of this Court's constitutional jurisprudence." *Garrett*, 531 U.S. at 365. Rather, Congress' § 5 power encompasses "'the authority both to remedy and to deter violation of rights guaranteed [by the Fourteenth Amendment] by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text.'" *Lane*, 541 U.S. at 518 (quoting *Kimel*, 528 U.S. at 81). This Court has "repeatedly affirmed that 'Congress may enact so-called prophylactic legislation that proscribes facially constitutional conduct, in order to prevent and deter unconstitutional conduct.'" *Id.* (quoting *Hibbs*, 538 U.S. at 727-28); *see also Boerne*, 521 U.S. at 518 ("Legislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into legislative spheres of autonomy previously reserved to the States.") (internal quotation omitted).

Accordingly, this Court has consistently stated that Congress has "a *wide berth* in devising appropriate remedial and preventative measures for unconstitutional actions." *Lane*, 541 U.S. at 520

(emphasis added). This judicial deference to congressional judgments under § 5 not only properly respects the Fourteenth Amendment's allocation of authority between the national legislature and the courts but also reflects Congress' greater institutional competence in making practical judgments about the prophylactic measures necessary to remedy and prevent violations of individuals' constitutional rights. As this Court has emphasized in a variety of contexts, "[w]e owe Congress' findings deference in part because the institution is far better equipped than the judiciary to amass and evaluate the vast amounts of data bearing upon legislative questions." *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 195 (1997) (internal quotations omitted). To assess the ways in which individuals' rights have been violated in various settings across the country, and what needs to be done to prevent such violations, Congress can draw upon its unique ability "to amass the stuff of actual experience and cull conclusions from it." *United States v. Gainey*, 380 U.S. 63, 66-67 (1965).

Congress' power to enact prophylactic measures under § 5 is not unlimited, however; it is subject to two significant constraints. First, Congress may act only in response to a record of constitutional violations "weighty enough to justify the enactment of prophylactic § 5 legislation." *Hibbs*, 538 U.S. at 735; *see also Lane*, 541 U.S. at 522-29 (examining the record of discrimination and violations of fundamental rights in the provision of public services and access to public facilities and concluding that these were "an appropriate subject for prophylactic legislation"); *Garrett*, 531 U.S. at 368 ("Congress' § 5 authority is appropriately exercised only in response to state transgressions.").

Second, § 5 legislation must be "'congruent and proportional to the targeted violation[s].'" *Hibbs*, 538 U.S. at 737 (quoting *Garrett*, 531 U.S. at 374). This Court has reasoned that, in the absence of such a limitation, Congress' power to adopt prophylactic measures could, in practice, effectively permit Congress to "substantive[ly] redefin[e]" the scope of the protections afforded by § 1 of the Fourteenth Amendment. *Lane*, 541 U.S. at 520; *Boerne*, 521 U.S. at 519-20. Conversely, a failure to give appropriate deference to Congress' judgments threatens to eliminate its § 5

power and to relegate Congress to "mere legislative repetition of this Court's constitutional jurisprudence." *Garrett*, 531 U.S. at 365. Precisely for that reason, in applying the congruence and proportionality test, the Court has "recognized that the line between remedial legislation and substantive redefinition is 'not easy to discern,'" and has emphasized that "'Congress must have *wide latitude* in determining where it lies.'" *Lane*, 541 U.S. at 520 (emphasis added) (quoting *Boerne*, 521 U.S. at 519-20). "It is for Congress in the first instance to 'determine *whether* and *what* legislation is needed to secure the guarantees of the Fourteenth Amendment,' and its conclusions are entitled to much deference." *Boerne*, 521 U.S. at 536 (emphasis added) (quoting *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966)).

As set forth below, both of these requirements are satisfied with respect to Title II as a whole.

II. As This Court Already Determined In *Lane*, Title II Satisfies The First Requirement For § 5 Legislation Because It Responds To A Record Of Widespread Constitutional Violations By Public Entities.

In *Lane*, this Court held that "the extensive record of disability discrimination" before Congress when it adopted Title II "ma[de] clear beyond peradventure that inadequate provision of public services and access to public facilities was an appropriate subject for prophylactic legislation." 541 U.S. at 529. As the lower court has itself recognized, this holding establishes, without more, that the first requirement of *Boerne*'s test is satisfied, and that the only question is whether Title II is congruent and proportional to the targeted violations. *See Miller v. King*, 384 F.3d 1248, 1272 (11th Cir. 2004) ("[T]he Supreme Court . . . concluded that Title II in its entirety satisfies *Boerne*'s . . . requirement that it be enacted in response to a history and pattern of States' constitutional violations. We are bound by that conclusion.").

To the extent that a further review of the record before Congress is necessary, it clearly confirms *Lane*'s holding on this score. As this Court explained, "Congress enacted Title II against a backdrop of

pervasive unequal treatment [of people with disabilities] in the administration of state services and programs, including systematic deprivations of fundamental rights," and this "pattern of disability discrimination persisted despite several federal and state legislative efforts to address it." 541 U.S. at 524, 526 (emphasis added). This pattern of pervasive disability discrimination was amply illustrated by the following examples noted by the Court:

> [A]s of 1979, most States . . . categorically disqualified "idiots" from voting, without regard to individual capacity. The majority of these laws remain on the books, and have been the subject of legal challenge as recently as 2001. Similarly, a number of States have prohibited and continue to prohibit persons with disabilities from engaging in activities such as marrying and serving as jurors. The historical experience that Title II reflects is also documented in this Court's cases, which have identified unconstitutional treatment of disabled persons by state agencies in a variety of settings, including unjustified commitment, the abuse and neglect of persons committed to state mental health hospitals, and irrational discrimination in zoning decisions. The decisions of other courts, too, document a pattern of unequal treatment in the administration of a wide range of public services, programs, and activities, including the penal system, public education, and voting. Notably, these decisions also demonstrate a pattern of unconstitutional treatment in the administration of justice.

Id. at 524-25 (footnotes and internal quotations omitted).

Indeed, as set forth below, the voluminous record before Congress[3] amply "demonstrat[ed] the nature and extent of

[3] Before enacting Title II, Congress held 13 committee hearings, 63 field hearings, and prolonged floor debate, all documenting this pattern of unequal treatment and deprivation of fundamental rights. S. Rep. No. 101-116, at 4-5, 8-9 (1989); H.R. Rep. No. 101-485, pt. 2, at 24-28, 31 (1990). Congress also considered several reports and surveys (Cont'd)

unconstitutional discrimination against persons with disabilities in the provision of public services," both in terms of irrational disability discrimination and in terms of violations of the fundamental rights of the disabled. *Id.* at 528.

A. Title II was enacted in response to an extensive record of irrational disability discrimination by public entities.

The Equal Protection clause prohibits governmental conduct that disfavors people with disabilities and that is irrational, arbitrary, or motivated by "mere negative attitudes" about people with disabilities or "vague, undifferentiated fears." *Cleburne*, 473 U.S. at 448-49, 474; *see also id.* at 446-47 (holding that "legislation that distinguishes between the mentally retarded and others must be rationally related to a legitimate governmental purpose" and that "some objectives – such as a bare desire to harm a politically unpopular group – are not legitimate state interests") (internal quotation omitted); *Garrett*, 531 U.S. at 374 (Kennedy, J., concurring) ("Prejudice . . . rises not from malice or hostile animus alone. It may result as well from insensitivity caused by simple want of careful, rational reflection or from some instinctive mechanism to guard against people who appear to be different in some respects from ourselves."); *Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 83 (1988) ("Arbitrary and irrational discrimination violates the Equal Protection Clause under even our most deferential standard of review.").

Much of the evidence Congress collected prior to enacting Title II involved conduct by public officials that fell into one of these two categories. *See Garrett*, 531 U.S. at 369, 372 n.7 (noting that

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(Cont'd)
highlighting violations of the rights of individuals with disabilities. *See, e.g.*, Task Force on the Rights and Empowerment of Americans with Disabilities, U.S. Cong., House of Representatives, From ADA to Empowerment (1990); United States Comm'n on Civil Rights, Accommodating the Spectrum of Individual Abilities (1983).

Congress had support for its finding that "discrimination against individuals with disabilities continue[s] to be a serious and pervasive social problem," and that the "overwhelming majority" of the evidence of unconstitutional state disability discrimination pertained to the "provision of public services and public accommodations"). Indeed, "[i]n the deliberations that led up to the enactment of the ADA," Congress "uncovered . . . hundreds of examples of unequal treatment of persons with disabilities by States and their political subdivisions." *Lane*, 541 U.S. at 526.

For example, Congress heard an account of a veteran with a disability being forbidden to use a public pool and being told by the park commissioner, "it's not my fault you went to Vietnam and got crippled," 3 STAFF OF THE HOUSE COMM. ON EDUC. AND LABOR, 101st CONG., 2d Sess., LEGIS. HIST. OF Pub. L. No. 101-336: THE AMERICANS WITH DISABILITIES ACT 1872 ("LEGIS. HIST.") (Comm. Print 1990) (statement of Peter Addesso); of a zookeeper's refusing to admit children with Down Syndrome "because he feared they would upset the chimpanzees," S. REP. No. 101-116, at 7; *see also* H.R. REP. No. 101-485, pt. 2, at 30; and of a student with epilepsy being asked to leave a state college because her seizures were "disrupt[ive]." 2 LEGIS. HIST. 1162 (statement of Peter Addesso). Congress also heard of a court ruling that "a cerebral palsied child, who was not a physical threat and was academically competitive, should be excluded from public school, because his teacher claimed that his physical appearance 'produced a nauseating effect' on his classmates." H.R. REP. No. 101-485, pt. 2, at 30 (quoting 117 CONG. REC. 45,974 (1971)); *see also id.* at 29 (describing testimony about a student in a wheelchair being "refused admission because the principal ruled that [the student] was a fire hazard").

As recently as 1983, fifteen States had compulsory sterilization laws for various categories of persons with disabilities. *See* United States Comm'n on Civil Rights, *Accommodating the Spectrum of Individual Abilities*, 37 n.144 (1983) ("*Spectrum*"). Congress was also concerned "that discrimination has been a frequent and pervasive problem in institutional settings and . . . that segregating disabled persons from others can be discriminatory." *Olmstead v.*

L.C., 527 U.S. 581, 614 (1999) (Kennedy, J., concurring) (explaining that "[b]oth of those concerns are consistent with the normal definition of discrimination – differential treatment of similarly situated groups").

At the time Congress enacted the ADA, the U.S. Commission on Civil Rights had recently concluded that: "Despite some improvements . . . [discrimination] persists in such critical areas as education, employment, institutionalization, medical treatment, involuntary sterilization, architectural barriers, and transportation." S. REP. NO. 101-116, at 8. The Committee on Education and Labor found that "[D]iscrimination [against people with disabilities] often results from false presumptions, generalizations, misperceptions, patronizing attitudes, ignorance, irrational fears, and pernicious mythologies." *Id.* at 30. Congressman McDermott explained that the ADA was necessary because: "Every day, millions of disabled Americans face discrimination based solely on their disability, and have no recourse or remedy against those who are discriminating against them." 136 CONG. REC. H2,626 (daily ed. May 22, 1990) (statement of Rep. McDermott); *see also* 136 CONG. REC. H2447 (daily ed. May 17, 1990) (statement of Rep. Miller) ("If we continue to shut those with disabilities out, . . . if we continue to permit blatant discrimination[,] then we, as individuals, and as a society are the ones who must bear the consequences.").

Irrational disability discrimination in the administration of public services and programs poses a particular problem because it can lead to the permanent isolation and exclusion of individuals with disabilities. *See* 42 U.S.C. § 12101(a)(7) (stating the Congressional finding that "individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society"); *Lane*, 541 U.S. at 516 (quoting same). Whereas irrational disability discrimination in other areas, such as State employment, generally leaves open the possibility of pursuing similar opportunities or services in the private sector, there are often no alternatives or opt-out options available in the public programs and services regulated

under Title II. *See* S. REP. No. 101-116, at 12 ("[A]ccess to all public services is particularly critical in rural areas, because State and local government activities are frequently the major activities in such small towns. . . . [C]urrent law . . . does not protect people with disabilities in such areas from discrimination."). Exclusion from programs and services that allow people with disabilities to participate in the political process is particularly pernicious, since it prevents people with disabilities from shaping how the laws affect them. *See Kramer v. Union Free School Dist.*, 395 U.S. 621, 627 (1969) (describing "the danger of denying some citizens any effective voice in the governmental affairs which substantially affect their lives").

B. Title II also responded to widespread violations of the fundamental constitutional rights of individuals with disabilities.

In addition to responding to the extensive record of unconstitutional disability discrimination, Title II was "aimed at the enforcement of a variety of basic rights." *Lane*, 541 U.S. at 529. These included the fundamental rights of access to courts, *see id.* at 527 ("Congress itself heard testimony from persons with disabilities who described the physical inaccessibility of local courthouses."), and voting. *See, e.g.*, S. REP. No. 101-116, at 12 (describing the inability of citizens with disabilities to "exercise one of [their] most basic rights as an American" because polling places or voting machines were inaccessible); *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972) (recognizing voting as "a fundamental political right, . . . preservative of all rights"). Congress had heard evidence of violations of the right of individuals with disabilities to procreate, *see supra* at 11 (discussing mandatory sterilization laws); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (holding that strict scrutiny governs sterilization classifications); and of their right to retain custody of their children. *See, e.g.*, H.R. REP. No. 101-485, pt. 2, at 41 ("[B]eing paralyzed has meant far more than being unable to walk – it has meant being . . . deemed an 'unfit parent'" in custody proceedings); *Stanley v. Illinois*, 405 U.S. 645 (1972) (recognizing the ability to retain custody of one's children as a fundamental right);

cf. In re Marriage of Carney, 24 Cal. 3d 725 (1979) (reversing trial court decision and awarding custody of minor children to parent with disability).

Congress had also been presented with evidence of unconstitutionally inhumane and abusive treatment of institutionalized individuals, and cruel and unusual punishment of prisoners with disabilities. *See, e.g.*, 132 CONG. REC. S5914-01 (daily ed. May 14, 1986) (statement of Sen. Kerry) ("The extent of neglect and abuse uncovered in [State-run mental health facilities] was beyond belief."); *Civil Rights of Institutionalized Persons: Hearings on S. 1393 Before the Subcomm. on the Const. of the Sen. Comm. on the Judiciary*, 95th Cong. 127 (1977) (statement of Michael D. McGuire, M.D.) ("the personnel regarded patients as animals . . . [and] group kickings and beatings were part of the program"); *Youngberg v. Romeo*, 457 U.S. 307, 315-16 (1982) (recognizing that involuntarily committed individuals have a substantive due process right to safe conditions); *Spectrum*, at 168 (listing, *inter alia*, the "[i]nadequate treatment and rehabilitation programs in penal and juvenile facilities[,] [i]nadequate ability to deal with physically handicapped accused persons and convicts (*e.g.*, accessible jail cells and toilet facilities) [and] [a]buse of handicapped persons by other inmates"); *Trop v. Dulles*, 356 U.S. 86, 101 n.32 (1958) (explaining that the Court "examines the particular punishment involved in light of the basic prohibition against inhuman treatment" to determine whether it is cruel and unusual). Judicial decisions in the years preceding the ADA's enactment further documented violations of disabled prisoners' rights. *See, e.g., Parrish v. Johnson*, 800 F.2d 600, 602-03 (6th Cir. 1986) (describing paraplegic inmates' being forced to sit in own feces, being denied requests for medical aid, and being given food placed in deliberately inaccessible positions); *La Faut v. Smith*, 834 F.2d 389, 394 (4th Cir. 1987) (describing a paraplegic inmate who was unable to access toilet facilities).

Congress designed Title II to prevent such fundamental rights violations and to better enable individuals with disabilities to participate in the central functions of their government and the services it provides. This Court has repeatedly recognized the profound

importance of giving every person access to government. *See, e.g.*, *Romer v. Evans*, 517 U.S. 620, 633 (1996) ("Central both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance."); *McDonald v. Smith*, 472 U.S. 479 (1985) (upholding right to petition the government for redress of grievances); *Boddie v. Conn.*, 401 U.S. 371 (1971) (guaranteeing right to access the courts).[4]

III. Because It Is A Congruent And Proportional Response To The Widespread Constitutional Violations Congress Identified, Title II Satisfies The Second Requirement For § 5 Legislation.

The only remaining question is whether Title II is "congruent and proportional to the targeted violation[s]." *Garrett*, 531 U.S. at 374. Especially in light of the deference due to Congress' choice of means, *see supra* at 7, the answer to that question must be yes.

As an initial matter, the fact that Title II reaches all public programs and services[5] does *not* mean that it is not "congruent and proportional." On the contrary, because "the appropriateness of remedial measures must be considered in light of the evil presented," *Boerne*, 521 U.S. at 530, the broad sweep of Title II is warranted

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[4] That Title II responded to an extensive record of constitutional violations entirely distinguishes it from the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. §§ 2000bb, *et seq.*, which this Court invalidated in *City of Boerne v. Flores*, 521 U.S. 507 (1997). Although the RFRA also targeted a fundamental right, that of free exercise of religion, this Court found in *Boerne* that Congress had failed to make any showing prior to enacting the RFRA that people's free exercise rights were being violated by the States. *See id.* at 530 ("RFRA's legislative record lack[ed] examples of modern instances of generally applicable laws passed because of religious bigotry").

[5] Public transportation is the one exception. *See supra* note 2; *see also* 28 C.F.R. § 35.102(b) ("To the extent that public transportation services, programs, and activities of public entities are covered by subtitle B of title II of the ADA, they are not subject to the requirements of [the regulations implementing subtitle A].").

in light of the "wide range of public services, programs, and activities" that had exhibited "pervasive" patterns of unconstitutional discrimination. *Lane*, 541 U.S. at 525-26. Moreover, "'[d]ifficult and intractable problems often require powerful remedies,'" *id.* at 524 (quoting *Kimel*, 528 U.S. at 88), and the problems Title II was designed to address were – and are – difficult and intractable: "Th[e] pattern of disability discrimination [had] persisted despite several federal and state legislative efforts to address it. In the deliberations that led up to the enactment of the ADA, Congress identified important shortcomings in existing laws that rendered them 'inadequate.'" *Id.* at 526 (quoting S. REP. No. 101-116, at 18). Faced with the severe, persistent problem of unconstitutional treatment of individuals with disabilities across a wide range of governmental functions and services, Congress had reason to enact a remedy that comprehensively addressed the full scope of that problem.

Although the *range* of programs reached by Title II is comprehensive, the "remedy Congress chose is nevertheless a limited one." *Id.* at 531-32. Thus, for example, Title II "requires only 'reasonable modifications' that would not fundamentally alter the nature of the service provided, and only when the individual seeking modification is otherwise eligible for the service." *Id.* at 531-32 (quoting 42 U.S.C. § 12131(2)). As explained below, a careful examination of the flexibility and defenses built into the statute and its implementing regulations makes clear that Title II, considered as a whole, is a proportional and congruent response to the problems Congress had documented.

A. Title II gives public entities substantial flexibility and does not pose undue burdens.

The requirements imposed by Title II and its implementing regulations fall into four basic categories: (1) program accessibility, (2) policy modifications, (3) effective communications, and (4) new construction and alterations. These requirements apply to all governmental services other than public transportation, but each has significant limitations.

1. Program accessibility.

Title II states that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. The Department of Justice's implementing regulations explain that this requires public entities to "operate each service, program, or activity so that the service, program, or activity, *when viewed in its entirety*, is readily accessible to and usable by individuals with disabilities." 28 C.F.R. § 35.150(a) (emphasis added).[6] The regulations also specifically provide that this "does not . . . [n]ecessarily require a public entity to make each of its existing facilities accessible to and usable by individuals with disabilities," nor does it "[r]equire a public entity to take any action that would threaten or destroy the historic significance of an historic property." *Id.* § 35.150(a)(1), (2). In order to allow public entities to preserve the essential characteristics of their programs and services, the regulations do not require actions that "would result in a fundamental

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[6] Although many of the key limitations on Title II's requirements appear in the implementing regulations, it is appropriate to consider those limitations in evaluating Title II's proportionality and congruence. Congress specifically stated in Title II that the regulations implementing Title II should be consistent with the regulations implementing the Rehabilitation Act. *See* 42 U.S.C. § 12134. The section of the Title II regulations containing the "fundamental alteration" and "undue burden" limitations was "taken from the [Rehabilitation Act] regulations for federally conducted programs, [and] generally codifies case law that defines the scope of the public entity's obligation to ensure program accessibility." 56 Fed. Reg. 35694, 35709 (July 26, 1991); *see also* 45 C.F.R. § 84.11(a) (providing that an accommodation is not reasonable under the Rehabilitation Act if it poses an "undue" hardship); *School Bd. of Nassau County v. Arline*, 480 U.S. 273, 288 n.17 (1987) ("Accommodation is not reasonable [under the Rehabilitation Act regulations] if it either imposes undue financial and administrative burdens on a grantee, or requires a fundamental alteration in the nature of the program") (internal quotations omitted); *see also Lane*, 541 U.S. at 531-32 (considering Title II's implementing regulations in determining that "the remedy Congress chose [in Title II] is . . . a limited one").

alteration in the nature of a service, program, or activity." Nor must public entities incur "undue financial and administrative burdens." *Id.* § 35.150(a)(3); *Olmstead*, 527 U.S. at 604 (plurality opinion) (interpreting the fundamental alteration limitation to "allow the State to show that, in the allocation of available resources, immediate relief for the plaintiffs would be inequitable, given the responsibility the State has undertaken" with regard to the program or service as a whole).

The regulations are very flexible, allowing public entities many compliance options. *See, e.g.*, 28 C.F.R. § 35.150(b) (listing numerous methods of providing program access); *Lane*, 541 U.S. at 532 ("As Title II's implementing regulations make clear, the reasonable modification requirement can be satisfied in a number of ways."). The Department of Justice has provided guidance reinforcing that governmental entities may achieve this overall program accessibility objective through a wide variety of means. *See, e.g.*, http://www.usdoj.gov/crt/foia/tal713.txt (Sept. 17, 1996) (inquiry regarding tornado warnings for people with hearing impairments: "suggestion of a flashing light that is activated when a tornado siren is activated is one possible means of ensuring effective communication of tornado warnings to individuals with hearing impairments. Other options may also be available. The ADA does not dictate use of any particular method of complying with title II's effective communication requirement, as long as the method chosen ensures effective communication with persons with disabilities."); http://www.usdoj.gov/crt/foia/lofc021.txt (Sept. 10, 1993) (allowing States with inaccessible polling places to provide access to voters with mobility impairments by having polling place managers take the voting list and the voter's ballot to the voter in his or her vehicle).

2. Policy modifications.

Title II's implementing regulations also require public entities to "make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making

the modifications would fundamentally alter the nature of the service, program, or activity." 28 C.F.R. § 35.130(b)(7). As the text of this provision makes clear, it is aimed specifically at preventing policies that discriminate on the basis of disability. But even discriminatory policies need not be changed if the modifications would fundamentally alter the service, program, or activity, or if the modification would otherwise be unreasonable. *Id.*

Often, the modifications are cost free. The Justice Department's Technical Assistance Manual provides an illustration of such a situation:

> ILLUSTRATION 3: A county ordinance prohibits the use of golf carts on public highways. An individual with a mobility impairment uses a golf cart as a mobility device. Allowing use of the golf cart as a mobility device on the shoulders of public highways where pedestrians are permitted, in limited circumstances that do not involve a significant risk to the health or safety of others, is a reasonable modification of the county policy.

Department of Justice, Americans with Disabilities Act Technical Assistance Manual Covering State and Local Government Programs and Services, http://www.usdoj.gov/crt/ada/taman2.html#II-3.6100 (modified Oct. 27, 2004). Moreover, public entities need not fundamentally alter their programs. *See, e.g.*, http://www.usdoj.gov/crt/foia/tal816.htm (May 30, 2000) (in case involving requested modification of flood ordinance, Department wrote, "While Title II and the Fair Housing Act require reasonable modification of zoning ordinances and procedures, they do not provide a broad exemption from zoning requirements for individuals with disabilities.").

3. Effective communications.

Title II's implementing regulations further provide that "[a] public entity shall take appropriate steps to ensure that communications with applicants, participants, and members of the public with disabilities are as effective as communications with others." 28 C.F.R. § 35.160(a). That obligation is limited, however, in that it

does not require public entities to do anything that "would result in a fundamental alteration in the nature of a service, program, or activity" or that would pose "undue financial and administrative burdens." *Id.* § 35.164.

4. New construction and alterations.

Title II's implementing regulations also require that facilities or parts of facilities "constructed by, on behalf of, or for the use of a public entity shall be designed and constructed in such manner that [they are] . . . readily accessible to and usable by individuals with disabilities." *Id.* § 35.151(a). When a public entity alters a facility or part of a facility "in a manner that affects or could affect [its] usability," "to the maximum extent feasible," its alterations must be done such "that the altered portion of the facility is readily accessible to and usable by individuals with disabilities." *Id.* § 35.151(b). The Congressional Budget Office's cost estimate report for the ADA stated that "[a]ccording to a study conducted by the Department of Housing and Urban Development in 1978, the cost of making a building accessible to the handicapped is less than one percent of total construction costs if the accessibility features are included in the original building design." H.R. REP. NO. 101-485, pt. 1, at 49; *see also* H.R. REP. NO. 101-485, pt. 2, at 36 ("Several witnesses also recognized that newly constructed build-ups should be fully accessible because the additional costs for making new facilities accessible are often nonexistent or negligible.").[7]

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[7] Again, the Justice Department's technical assistance letters indicate the limitations on Title II's requirements. *See, e.g.*, http://www.usdoj.gov/crt/foia/tal806.htm (Nov. 16, 1999) (state not required to build special paths across levee for people with disabilities); http://www.usdoj.gov/crt/foia/tal785.htm (Dec. 14, 1998) (inquiry whether elevator must be added if one-floor post office expanded: "if space is being added to an existing floor level without affecting the circulation path between the basement and the ground floor, then it is unlikely that title II would require an elevator so long as the added space is, to the maximum extent feasible, readily accessible"); http://www.usdoj.gov/crt/foia/tal720.txt (Dec. 13, 1996) (inquiry whether ADA requires

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B. The limitations and defenses built into Title II and its implementing regulations make Title II's requirements appropriately tailored prophylactic measures.

By exempting modifications and accommodations that are unreasonable, impose "undue" burdens, or necessitate "fundamental alterations," Congress has focused Title II on those instances in which, even though the governmental entity could make "reasonable" modifications without "undue" expense, it nonetheless persists in refusing to do so and thereby excludes individuals with disabilities from government services and programs that other citizens enjoy. Congress was justified in concluding that such instances are sufficiently likely to involve unconstitutional discrimination that any further effort to determine whether the public entity's purported justifications are valid and legitimate, or merely pretextual, is simply not worth the cost and would create an unacceptable risk that, in practice, the guarantees of the Fourteenth Amendment would be under-enforced. It is inherent in the nature of a "prophylactic" rule that, at some point, further case-specific inquiry is deemed not to be cost-effective. *Cf. Coleman v. Thompson*, 501 U.S. 722, 737 (1991) ("'Cases that do not fit the generalization may arise, but a per se rule reflects the judgment that such cases are not sufficiently common or important to justify the time and expense necessary to identify them.'") (quoting *Continental T. V. v. GTE Sylvania*, 433 U.S. 36, 50 n.16 (1977)). Indeed, in affirming Congress' power to enact such rules under § 5, this Court has expressly recognized that Congress is entitled to adopt rules that are fully sufficient to prevent "subtle discrimination that may be difficult to detect on a case-by-case basis." *Hibbs*, 538 U.S. at 736; *see also Boerne*, 521 U.S. at 525-26 (in adopting prophylactic rules under § 5, Congress may properly consider the "costly character of case-by-case litigation")

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pedestrian walkways at highway construction sites: "the ADA does not require installation of pedestrian walkways in new construction projects where no such walkways are planned").

(citing *South Carolina v. Katzenbach*, 383 U.S. 301, 328 (1966)). Here, Congress chose to permit States to attempt to justify their discrimination against the disabled on the grounds that including them in the State's programs and services would impose "undue" burdens or would require "fundamental alterations." Having done so, Congress could legitimately conclude that the costs of further case-specific inquiry into the State's motives or justifications would be paid in the form of unremedied or undetected constitutional violations. Particularly in light of the "sheer volume of evidence demonstrating the nature and extent of unconstitutional discrimination against persons with disabilities in the provision of public services," *Lane*, 541 U.S. at 528, that was a choice § 5 permits Congress to make.

For example, consider a situation in which a city council historically held hearings on the second floor of a building without elevators, and the council refused to move to an accessible first floor room to allow citizens in wheelchairs to attend. Congress was justified in enacting broad prophylactic rules that essentially assumed that such situations are so likely to involve unconstitutional discrimination, or to create an unacceptable risk of undetected constitutional violations, that further inquiry into the council's purported "justifications" for such conduct would not be worth the cost. *See Hunter v. Underwood*, 471 U.S. 222, 228 (1985) ("Proving the motivation behind official action is often a problematic undertaking.").

Expanding governmental services to people with disabilities is also prophylactic, because including those people in governmental programs and services and decreasing their isolation reduces stereotypes about them. *Cf. Hibbs*, 538 U.S. at 736 (explaining that the FMLA targets "[s]tereotypes about women's domestic roles [that] are reinforced by parallel stereotypes presuming a lack of domestic responsibilities for men. . . . Those perceptions, in turn, Congress reasoned, lead to subtle discrimination that may be difficult to detect on a case-by-case basis."). Ensuring that people with disabilities are not excluded from the political process also increases their ability to shape events that affect them, thereby diminishing the possibility of unconstitutional discrimination.

Because Title II forbids government behavior that is itself unconstitutionally discriminatory or that is difficult or costly to distinguish from conduct that is, Title II is a proportional and congruent response to the record of unconstitutional disability discrimination Congress faced. *Lane*, 541 U.S. at 518 ("'Congress may enact so-called prophylactic legislation that proscribes facially constitutional conduct, in order to prevent and deter unconstitutional conduct.'") (quoting *Hibbs*, 538 U.S. at 727-28).

C. Title II's discrimination prevention measures are clearly within the bounds of what *Lane* specifically allows.

This Court explained in *Lane* that "[w]hen Congress seeks to remedy or prevent unconstitutional discrimination, § 5 authorizes it to enact prophylactic legislation proscribing practices that are discriminatory in effect, if not in intent, to carry out the basic objectives of the Equal Protection Clause." *Id.* at 520. In other words, Congress may proscribe practices that are not unconstitutional, but which merely cause a disparate impact. *See id.* at 519 (explaining that the Court in *Hibbs* upheld the FMLA as a valid exercise of Congress' § 5 power to combat unconstitutional sex discrimination, "even though there was no suggestion that the State's leave policy was adopted or applied with a discriminatory purpose that would render it unconstitutional under the rule of *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256 (1979)").

Title II goes no further than to "proscrib[e] practices that are discriminatory in effect, if not in intent." *Lane*, 541 U.S. at 520. Indeed, what Title II requires is much more limited. Title II requires certain modifications in public services, programs, and activities, when, absent those modifications, the services, programs, and activities would exclude participants with disabilities – *i.e.*, when the services, programs, and activities otherwise would be discriminatory in effect. 42 U.S.C. § 12132. But Title II does not forbid even all practices that are discriminatory in effect. As described above, it requires only "reasonable" modifications, *id.* § 12131(2),

and exempts modifications that would pose an undue burden or fundamentally alter the nature of a service, program, or activity. 28 C.F.R. §§ 35.150(a), 35.164.

Lane's holding that Congress may enact prophylactic legislation proscribing practices that are discriminatory in effect but not necessarily intent does not undermine this Court's decision in *Garrett*. *Lane* said only that "§ 5 authorizes [Congress] to enact prophylactic legislation proscribing practices that are discriminatory in effect, if not in intent," "[*w*]*hen Congress seeks to remedy or prevent unconstitutional discrimination*," or, in other words, when the first requirement for § 5 legislation is met. 541 U.S. at 520 (emphasis added). This Court held in *Garrett* that the record "fail[ed] to show that Congress [had] . . . identif[ied] a pattern of irrational state discrimination in employment against the disabled" before enacting Title I of the ADA. 531 U.S. 356, 368 (2001). This Court therefore did not decide in *Garrett* whether the requirements of Title I would have constituted a proportional and congruent response to an extensive record of unconstitutional discrimination against individuals with disabilities in the employment context.[8]

D. Title II also prevents and remedies violations of fundamental rights, further demonstrating that it is a proportional and congruent response to the record of constitutional violations before Congress.

By requiring public entities to operate services, programs, and activities in a manner accessible to people with disabilities, and by prohibiting public entities from adopting discriminatory policies, Title II also prevents the sorts of violations of the fundamental rights of individuals with disabilities that Congress catalogued prior to enacting the ADA. For example, Title II prohibits policies mandating sterilization or denying child custody to parents with disabilities, because such policies discriminate on the basis of disability.

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[8] This Court has also noted that a State's "interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as employer." *Waters v. Churchill*, 511 U.S. 661, 675 (1994).

42 U.S.C. § 12132; 28 C.F.R. § 35.130(b)(7). By requiring prisons to provide restroom facilities accessible to prisoners with disabilities, Title II prevents prisoners with disabilities from being subjected to the cruel and unusual punishment of being forced to sit in their own feces or to fall and break limbs while attempting to reach a toilet. 42 U.S.C. § 12132; 28 C.F.R. § 35.150. Title II also protects a variety of due process rights by requiring courthouse accessibility. *See Lane*, 541 U.S. at 527; *id.* at 533 ("Title II's affirmative obligation to accommodate persons with disabilities in the administration of justice cannot be said to be 'so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior.'") (quoting *Boerne*, 521 U.S. at 532). Similarly, it protects voting rights by requiring polling place accessibility. 42 U.S.C. § 12132. That Title II responds to the extensive record before Congress of violations of individuals with disabilities' fundamental rights by preventing and remedying future violations of those rights further confirms that Title II is proportional and congruent to Congress' "remedial . . . object." *Lane*, 541 U.S. at 533.

IV. Congress' Legislative Judgments Deserve Particularly Strong Deference When, As Here, Congress Is Protecting Fundamental Rights Pursuant To § 5 Of The Fourteenth Amendment.

Because Title II is a proportional and congruent response to the vast record of constitutional violations before Congress, and because Title II is completely within the bounds of what *Lane* declared appropriate, Title II should be found to be valid § 5 legislation under the normal, appropriately deferential standards applied by this Court in evaluating *any* legislative choices made by Congress under its § 5 powers. Because Title II, in many of its applications, is aimed at remedying and deterring violations of *fundamental* rights, however, the congressional judgments underlying Title II should be given special deference, and any doubts should therefore be resolved in favor of Title II's constitutionality.

A. Congress' § 5 power is particularly broad and its legislative judgments are entitled to especially strong deference when it is responding to violations of fundamental rights.

As this Court has explained, Congress' conclusions about "whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment" always "are entitled to much deference." *Boerne*, 521 U.S. at 536; *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966). Congress' conclusions are entitled to even more deference when the legislation at issue protects fundamental rights or suspect classes. This Court has explicitly held that "'it [i]s easier for Congress to show a pattern of state constitutional violations'" to justify the need for § 5 legislation when Congress is addressing rights or classifications that trigger a heightened standard of judicial scrutiny than when Congress is targeting "classifications subject to rational-basis review." *Lane*, 541 U.S. at 529 (quoting *Hibbs*, 538 U.S. at 735-37). Likewise, because "the appropriateness of remedial measures must be considered in light of the evil presented," *Boerne*, 521 U.S. at 530, when Congress is legislating to protect fundamental rights or suspect classes, it should be easier for Congress to demonstrate that the remedial measures it has chosen are appropriate. Because Title II protects a variety of fundamental rights, *see supra* at 13-15, Congress' decisions about Title II's content are entitled to such deference, even though disability is itself not a suspect classification. *See Cleburne*, 473 U.S. at 446-47.[9]

Hibbs applied exactly such expanded deference. There, this Court deferred to Congress' judgments about the appropriateness

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[9] That Title II responds to violations of fundamental rights further distinguishes it from Title I of the ADA, at issue in *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001). Because there is no fundamental right to government employment, *see Mass. Bd. of Retirement v. Murgia*, 427 U.S. 307, 313 (1976), there was no fundamental right at stake in *Garrett*. In contrast, this Court has held that the record that motivated Congress to enact Title II contained widespread violations of individuals with disabilities' fundamental constitutional rights. *Lane*, 541 U.S. at 522-29.

of the remedial measures in the Family and Medical Leave Act ("FMLA"). *Hibbs*, 538 U.S. at 737-40. The evidence Congress had heard of gender-based unequal treatment prior to enacting the FMLA was composed only of examples of employers' (mostly private, not state) providing more expansive maternity than paternity leave. *Id.* at 730-32. The remedy Congress chose to address this differential treatment was not just to prohibit gender-based differentiation in parental leave policies, or even in all leave policies, but instead to require nearly all employers to give workers up to 12 weeks of unpaid leave annually "for any of several reasons, including the onset of a serious health condition in an employee's spouse, child, or parent." *Id.* at 724 (internal quotation omitted). In response to the dissenting Justices' suggestion that the appropriate remedy would have been simply to proscribe discrimination in the provision of any leave policies instead of creating what is essentially a new entitlement, the Court explained that "this position cannot be squared with our recognition that Congress 'is not confined to the enactment of legislation that merely parrots the precise wording of the Fourteenth Amendment.'" *Id.* at 737 (quoting *Kimel*, 528 U.S. at 81).

As *Hibbs* and *Lane* make clear, when fundamental rights or suspect classifications are at issue, Congress has a particularly "wide berth in devising appropriate remedial and preventative measures for unconstitutional actions." *Lane*, 541 U.S. at 520. Congress thus had particularly broad authority to draw upon when it enacted Title II.

B. Especially when Congress is acting under § 5 to respond to violations of fundamental rights, Congress should have discretion in how it drafts legislation.

This Court has emphasized that Congress' enactments are entitled to a "presumption of constitutionality." *United States v. Morrison*, 529 U.S. 598, 607 (2000). This is at least in part because of the respect due by courts to "a coordinate branch of Government." *Id.* Respecting Congress as a coordinate branch of government also entails allowing Congress to approach the drafting of legislation in

the manner it sees fit. *Cf. Boerne*, 521 U.S. at 531-32 (noting that "[a]s a general matter, it is for Congress to determine the method by which it will reach a decision"). For instance, when addressing a problem that manifests itself in a variety of contexts, Congress should be able to enact generally applicable standards to apply to all of those contexts. Congress should not be forced to legislate bit by bit, addressing one narrow context at a time.

Congress enacted Title II to "reach[] a wide array of official conduct in an effort to enforce an equally wide array of constitutional guarantees." *Lane*, 541 U.S. at 530. Congress should be entitled to do so, without writing a separate statute for each constitutional guarantee and each area of official conduct – particularly when responding to violations of fundamental rights. To insist that Congress draft separate provisions to address each sub-context in which the rights of individuals with disabilities are violated, with a separate evidentiary record to support each, would be inconsistent with courts' respect for Congress as a coequal branch of the government. It would force Congress to act like an administrative agency, writing detailed regulations instead of statutes that embody national policy principles. This Court therefore should review Title II in its entirety and declare it a valid exercise of Congress' § 5 authority.

CONCLUSION

For the reasons set forth above, and consistent with their commitment to protecting the constitutional rights of individuals with disabilities, *Amici* respectfully submit that the Court should hold that Title II as a whole was validly enacted pursuant to Congress' power under § 5 of the Fourteenth Amendment.

Respectfully submitted,

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